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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REDEFINING PROGRESS, a California Non-Profit Corporation; on behalf of itself and all others similarly situated. and on behalf of the general public,

Plaintiff.

v

FAX.COM. INC.; KEVIN KATZ; COX BUSINESS SERVICES, L.L.C.: AMERICAN BENEFIT MORTGAGE, INC., and all others similarly situated; and DOES 1 through 10.000.

Defendants.

Case No C 02-4057 MJJ

PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO STATE A CLAIM AND BASED ON PRIMARY JURISDICTION

Dare January 21.2003
Time 9:30 a.m
Judge Hon Martin J Jenkins

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INTRODUCTION

> They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall. . . . It is telephone terrorism, and it has got to stop.[1]

Under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the "TCPA"), it is unlawful for any person "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[.]" 47 U.S.C. § 227(b)(1)(C). Under the TCPA, "[t]he term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4)

Defendant Fax.com, Inc. ("Fax.com") is the largest fax broadcaster in the United States.[2] Class Action Complaint (the "Complaint" or "Compl.") ¶ 10. Defendant Kevin Katz ("Kntz") is Fax.com's co-founder and President. Compl. ¶ 11. Defendant American Benefit Mortgage, Inc. ("ABM") is one of Fax.com's customers, for whom Fax.com broadcasts unsolicited advertisements to individuals and businesses such as plaintiff Redefining Progress ("Plaintiff") listed on Fax.com's fax number database. Compl. ¶ 40

As alleged in the Complaint, Defendants Fax.com, Katz, ABM, and Does 1 through 10,000 (collectively, "the Fax.com Defendants"), have brazenly violated and continue to violate the TCPA by fax broadcasting millions of unsolicited advertisements every day. See Compl. ¶¶ 1, 20. Cox Business Services, L.L.C. ("Cox," and, together with the Fax.com Defendants, "Defendants")[3] has had both actual notice of and a high degree of involvement in the Fax.com Defendants' fax-spamming operation, and has caused or permitted these TCPA violations, rendering it liable under the TCPA and the Communications Act of 1934 (the

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[1] 137 Cong. Rec. S 16204, 16205 (Nov. 7, 1991) (statement of Sen. Hollings). Senator Hollings sponsored the Automated Telephone Consumer Protection Act of 1991 that later became known as the Telephone Consumer Protection Act of 1991.

[2] The term "fax broadcasting" means the practice of faxing text or images en masse to multiple recipients at once, where each fax number dialed is drawn from a list or database of fax numbers. See Compl. ¶ 1.

[3] Cox contends that the proper defendant is Cox California Telecom, L.L.C. dba Cox Business Services. The distinction is immaterial for purposes of the pending motions.

"Communications Act"), 47 U.S C. § 206. See Coinpl. ¶¶ I. 75-79. This case is one consumer's attempt to fight back against the daily bombardment of unsolicited fax advertisements being sent by Defendants and other fax spammers

Defendants have filed two separate motions io dismiss the Complaint. Both the Fax.com Defendants and Cox have moved to dismiss the Complaint on subject matter jurisdiction grounds. In addition, Cox has moved to dismiss the Complaint for failure Io stale a claim, and under the doctrine of primary jurisdiction. For the reasons set forth below, none of these arguments have merit.

STATEMENT OF FACTS

On August 22, 2002. Plaintiff filed this Complaint against Defendants asserting five federal and slate law claims foi-:(1) violations of the TCPA (against all Defendants); (2) violations of Section 206 of the Communications Act (against Cox only), based on Cox'S participation in violations of the TCPA; (3)violations of California's Unfair Competition Law, Business & Professions Code § 17200,et seq. (against all Defendants); **(4)** unjust enrichment (against Fax.com, Karz and Cox); and (5) violation of the Uniform Fraudulent Ti-ansfer Act, California Civil Code § 3439, et seq. (against F;ix.com and Katz). See Compl. ¶¶ 66-96. Based on **Cox'** status as a federally-regulated "common carrier," this Court has original jurisdiction over Plaintiff's TCPA and Section 206 claims against Cox, and supplemental Jurisdiction over Plaintiff's remaining claims. See id. ¶ 2.

As alleged in the Complaint, Fax.com's entire business model is based on "sending unsolicited advertisements to telephone facsimile machines. which is illegal under federal law." Id. ¶ 15;see id. ¶¶ 17-46. **As** stated by the Federal Communications commission ("FCC"):

> Fax.com's primary business activity itself constitutes a massive on-going violation of section 227(b)(1)(C) of *the* Act and section 64.1200(a)(3) of the Commission's **rules,** and that Fax.com is well aware of this fact. Fax.com's primary commercial offering is a fax broadcasting service that clearly does not comply with federal restrictions goveining facsimile advertisements.

Compl. ¶ 33 (quoting In re Fax.com. Inc., Notice of Apparent Liability for Forfeiture, FCC 02-

226, File No. EB-02TC-120, NAL/Acct. No. 20023217004, ¶19 (Aug. 7, 2002) ("Notice of Apparent Liability of Fax.com," attached as Exhibit B to the Declaration of David E. Mills in Support of Defendant Cox Business Services' Motion to Dismiss).

Fax.com uses computers and automated dialing equipment to constantly search for and collect "undiscovered" fax numbers. Complaint ¶ 17. Fax.com also purchases fax machine numbers from hundreds of sources. Id. As a result of these efforts, Fax.com has developed the world's largest fax number database, and broadcasts over three million unsolicited fax advertisements per day to fax machines across the United States. See Complaint ¶¶ 15, 17, 19-20 Fax.com's mission has been to "revolutionize the fax broadcasting industry" and to provide a means for businesses to achieve their direct marketing goals. See id. ¶¶ 17, 21-22, 27 ("Fax broadcasting is by far the least expensive form of brand and awareness development. Each fax costs less than a bulk mail stamp, and NO fax ever goes unread." "Fax broadcasting is so effective and so inexpensive, it allows anyone to market like the big boys.").

By its *own admission*, at all times, Cox has been highly involved in and had actual notice of Fax.com's "core" business – sending unsolicited faxes "marketing" products and services to its "database" of fax numbers, in violation of the TCPA. See id. ¶¶ 35-39. In fact, Cox specifically customized its services to meet Fax.com's fax broadcasting needs. See id. ¶ 38 ("'With Cox, I can easily get everything I need to run my business[.]' said Katz. 'They've even been able to customize services to suit my business needs.'"). In a "Case Study" posted on its website, Cox openly boasted that:

> "With one of the largest fax databases in the world, . . . Fax.com has built its business around the technology that supports it. Since reliable telephone communications are vital to the success or failure of his company, Fax.com President Kevin Katz can't afford to take the issue of reliability too lightly."
>
> "'We're using Cox Communications' network and infrastructure for the core component of our business – marketing to companies through fax broadcast documents,' said Katz. 'Since we make our money through fax broadcasting, we need a reliable telephone service provider like Cox. Without telephone service, we're essentially shut down.'"

Compl. ¶ 35

ARGUMENT

I. UNDER 47 U.S.C. § 207, THIS COURT HAS ORIGINAL JURISDICTION OVER PLAINTIFF'S TCPA AND SECTION 206 CLAIMS AGAINST COX.

As alleged in Plaintiff's Complaint, this Court has original jurisdiction over Plaintiff's TCPA and Section 206 claims against Cox tinder an express jurisdictional provision of the Communications Act, 47 U.S.C.§ 207. See Compl.¶2. Section 206 provides that: "[i]n case any common carrier shall do, or cause or permit to be done, any act, matter or thing in [Chapter 5] prohibited or declared to be unlawful. . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of [Chapter 5]." 47 U.S.C. § 206. The TCPA is contained within Chapter 5 of Title 47, rendering common carriers liable for its violation under Section 206. In pertinent part, Section 207 provides that. "any person claiming to be damaged by any *common carrier* subject to the provisions of [Chapter 5] may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of [Chapter 5], in *any district court of the United States* . . ." 47 U.S.C.§ 207 (emphasis added). Accordingly, Section 207 gives district courts original jurisdiction over TCPA claims asserted against common carriers (as opposed to TCPA claims asserted against other types of defendants, such as the Fax.com Defendants).

A. Section 207 is a "Specific" Jurisdictional Statute Providing an Independent Basis for Federal Jurisdiction.

Notwithstanding the clear and express language of Section 207, Defendants assert that federal jurisdiction is lacking because Section 207 is a "general" jurisdictional statute whose provisions are trumped by the TCPA, a "specific" jurisdicfional statute. Defendants contend that under Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000), only state courts have jurisdiction over TCPA claims. Contrary to Defendants' assertion, Section 207 has never been held to be a "general" *jurisdictional* stature, and neither Murphey nor any other Court has ever held that federal jurisdiction is lacking over TCPA claims assened against federally-regulated common carriers

Only 28 U.S.C. §§ 1331. 1337, 1343, 1346(a)(2), and 1361 have been held to be

"general" jurisdictional statutes. See, e.g. Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S 480, 495 (1983); Simmons v Arkansas Power & Light Co., 655 F.2d 131, 133 (8th Cir. 1981); Schwarzer, et. al., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL (Rutter Group 2002). § 2:68. All other federal jurisdictional statutes are considered "specific" – e.g., those conferring federal jurisdiction over claims arising under federal patent, copyright, securities, antitrust, and postal laws. Id. § 2:71, et seq. Section 207, which pertains *only* to claims asserted against *common carriers* undei- the federal Communications Act. clearly falls on the "specific" side of this statutory divide. Indeed. Defendants have not cited a single case, arising in any context whatsoever, which even suggests that Seclion 207 is anything other than a "specific"jurisdictional statute. Accordingly. Section 207 vests district courts with original jurisdiction over Plaintiff's TCPA and Section 206 claims against Cox

The cases relied upon by Defendants are easily distinguished. In both Murphey and United Artists Theatre Circuit Inc v FCC. 147 F.Supp.2d 965 (D. Ariz. 2000), the plaintiff alleged federal jurisdiction solely under the generic federal question jurisdictional statute, 28 U.S.C.§ I331, and the TCPA. While those Courts held that neither statute conferred federal jurisdiction alone or together, neither Court determined whether an independent basis of federal jut-isdiction – such as Section 207 of the Communications Act – would allow a TCPA claim to be heard in federal court.[4]

[4] Carpenter v. Dep't of Transportation, 13 F.3d 313 (9th Cir. 1994). also relied upon by Defendanls. is completely inapposite. In Carpenter. the court attempted to harmonize two different federal statutes:. Section 504 of the Rehabilitation Act and the Hobbs Act. Under the Hobbs Act, federal appellate courts were expressly granted exclusive jurisdiction to review the Transportation Department's actions. but were unable to award damages. See 28 U.S.C.§ 2342 ("Court of appeals jurisdiction is exclusive."): Carpenter. 13 F.3d at 315. Section 504. however, allowed a person to sue the federal government for damages in district court. The plaintiff in that case argued that he should have been able io sue the Transportation Department for damages in district court under Section 504. The courl determined that it would be inconsistent with Congress' intent in passing the Hobbs Act to allow plaintiff to proceed under the Rehabilitation Act, holding that: "Specific grants of exclusive jurisdiction to the *courts of appeals* override general grants of jurisdiction to the district courts." Id. at 316 (emphasis added). The court's narrow holding was based on Congress' desire in enacting the Hobbs Act to help "increase the speed. efficiency and consistency of judicial review of [Interstate Commerce Commission] and (Transportation *Department]* actions. Id. (citing H.R. Rep. No. 1569, 93rd Cong.. 2d Sess. 4 (1974). reprinted in 1974 U.S.C.C.A.N. 7025, 7033-7034). Here. Plaintiff's claims have nothing to do with the Hobbs Act, the Rehabilitation Act. or exclusive jurisdiction of the courts of appeal. Plaintiff's case also has no relation to Congress' intent in passing the Hobbs Act – i.e., increasing the speed, efficiency and consistency of judicial review of Interstate Commerce Commission or Transportation Department actions. Carpenter's holding – that "[s]pecific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction *to* the *district* courts" – is wholly inapplicable here. Nor docs the underlying rationale of the court's holding – that allowing damages suits to be brought in district courts would defeat the purpose

As the Court held in Kinder v. Citibank, 2000 U.S.Dist. LEXIS 13853 (S.D. Cal 2000) "nothing in the TCPA precludes federal courts from hearing TCPA claims where some other independent basis for jurisdiction exists." Id. at *11. In that case, the court held that Murphey stood for only two "narrow" jurisdictional propositions: "(1) Congress did not intend the TCPA to confer federal district courts with jurisdiction over private actions, and (2) the generic federal question jurisdiction statute, 28 U.S.C.§ 1331, does not apply." Id. at *9. As the Court explained:

> Nothing in the Ninth Circuit's analysis suggests that the TCPA pi-ecludes districl courts from hearing private TCPA claims where some other independent basis for federal jurisdiction exists. such as diversity of citizenship or supplemental jurisdiction.
>
> Indeed. the district court's published decision in Murphey specifically emphasized that the plaintiff did not allege diversity of citizenship or assert a non-TCPA federal claim. See Murphey v. Lanier, 997 F.Supp. 1348, 1349 (S.D.Cal. 1998), *aff'd* 204 F.3d 911 (9th Cir. 2000).
>
> Moreover, in those actions where diversity of citizenship properly exists, Plaintiff's *interpretation* of the TCPA would create the anomalous result that slate law claims based on unlawful telephone calls could be brought in federal court, while federal TCPA claims based on rhose same calls could be heard only in state court. Such an interpi-etation would also undermine the purposes of supplemental jurisdiction by requiring parties who bring TCPA claims along with other federal claims to maintain separate, parallel actions in state and federal court.

Id. at *9-*10 & n.2.

Here, as in Kinder, Plaintiff's Complaint asserts an Independent federal basis of jurisdiction aside fi-om the general federal question statute, 28 U.S.C. § 1331. See Compl. ¶ 2. If Defendants' attack on federal jurisdtction were accepted, it would lead to the incongruous result of allowing only state courts to determine cases involving federal common carriers, which are otherwise regulated exclusively by the federal courts and the FCC.[5] Indeed, Cox repeatedly

of competing legislation – apply to the TCPA or Section 207 of the Communications Act. Rather. Congress' purpose in enacting the TCPA was to "protect the privacy interests of residential telephone subscribers by . . . restricting certain uses of facsimile [fax] machines and automatic dialers." International Science & Tech Inst. v. Inacom Comm., Inc., 106F.3d 1146, 1150 (4th Cir. 1997)(quoting S. Rep. No. 102-178, at 1 (1991). reprinted in 1991 U.S.C.C.A.N. 1968). These interests are advanced. and are not impaired. by allowing TCPA claims against common carriers to proceed in federal court.

[5] See MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086. 1093-1096 (3rd Cir. 1995).cert. denied, 519 U.S. 815 (1996) (recognizing broad preemptive effect of the Communications Act and federal jurisdiction Over

emphasizes the need for "uniformity" and "national policymaking" in determining the standards under which common carriers may be held liable under the TCPA. Cox MPA at 20-22. Such uniformity can *only* be served by recognizing original federal jurisdiction (and removal jurisdiction) over TCPA claims asserted against common carriers; it would be entirely defeated by holding that such claims may only be brought in state courts, where the courts of 50 different states might impose 50 different standards of liability.[6]

B. Section 207 and the TCPA Can Be Harmonized, Because Section 207 Only Applies to Claims Against Federally-Regulated Common Carriers.

Defendants' motion to dismiss for lack of federal jurisdiction must also be rejected for lack of an "irreconcilable conflict" between Section 207 and the TCPA. Principles of statutory construction that require a more recent "specific" statute to prevail over an earlier "general" statute apply only when an "irreconcilable conflict" exists between the statutes. Watt v. Alaska, 451 U.S. 259, 266 (1981); Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 490 n. 8 (9th Cir. 1984), cert. denied, 471 U.S. 1140 (1985); In re Pacific Far East Line, Inc., 644 F.2d 1290, 1294 (9th Cir. 1981). In any case, statutes are to be harmonized to the greatest extent possible. Chevron, 726 F.2d at 490 n. 8. Where the statutory language is clear, however, a court need look no further than the language of the statute itself. Sullivan v. Stroop, 496 U.S. 478, 482 (1990); United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989); Hellon & Assoc., Inc. v. Phoenix Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992). This is especially true if there is no "clearly expressed congressional intention to the contrary." Noriega-Sandoval v. INS, 911 F.2d 258, 260 (9th Cir. 1990). See also Owner-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner, 931 F.2d 582, 586 (9th Cir. 1991) (Congress presumed to know the contents of existing statutes when it enacts new legislation).

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claims against common carriers); Ivy Broadcasting Co v. American Te. & Tel. Co., 391 F.2d 486, 491 (2d Cir. 1968) (Communications Act is a uniform federal law governing common carriers' standards of service and potential liability when failing to comply with such standards); Benanti v. United States, 355 U.S. 96, 104 (1957) (Communications Act is "a comprehensive scheme" for the regulation of interstate communications and common carriers).

[6] Should this Court dismiss this case on jurisdictional grounds, as Defendants request, Plaintiff will re-file the action in a California state court, which will then be required to adjudicate the balance of Cox' motion to dismiss. See Toumajian v. Frailey, 135 F.3d 648, 656 (9th Cir. 1998) (if subject matter jurisdiction is found lacking, district court must dismiss or remand on that basis alone, and may not rule on merits of motion to dismiss).

In this case, Defendants' assertion that an "irreconcilable conflict" exists between Section 207 and the TCPA is both unsupported and demonstrably incorrect. Section 207 does not depend on the nature of the underlying Chapter 5 violation to determine whether a federal court has jurisdiction. See 47 U.S.C. § 207. Rather, jurisdiction under Section 207 is provided by the status of the defendant as *a common carrier* and an alleged violation of Chapter 5.[7]

Here, Cox does not deny that it is a common carrier subject to the provisions of Chapter 5. See Comtronics, Inc. v. Puerto Rico Tel. Co., 553 F.2d 701, 704 (5th Cir. 1977) (common carrier is subject to all the provisions of the Communications Act). Plaintiff's Complaint alleges injuries arising from Cox's violation of the TCPA, a Chapter 5 provision encompassed by Section 207. See Compl. ¶¶ 33-39, 66-79; Law Offices of Curtis, 305 F.3d at 98, 101. Section 207 provides that claims based on such Chapter 5 violations *by common carriers* may be brought in any district court. See 47 U.S.C. § 207. Under Murphey, TCPA claims against other types of defendants, such as the Fax.com Defendants, must be brought in state court, absent an alternative basis for federal jurisdiction. Accordingly, no irreconcilable conflict exists between the Section 207 and the TCPA, and this Court has original jurisdiction over Plaintiff's TCPA and Section 206 claims against Cox.

II. THE COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S REMAINING CLAIMS.

A. The Court Has Supplemental Jurisdiction Over Plaintiff's Remaining Claims, Which Arise From the Same Transactions as Plaintiff's Federal Claims Against Cox.

Where the district court has original jurisdiction over one or more claims, supplemental jurisdiction extends to all other claims which are transactionally related. 28 U.S.C. § 1367(a); Danner v. Himmelfarb, 858 F.2d 515, 522 (9th Cir. 1988); Clarendon, Ltd. v. State Bank of Saurashtra, 77 F.3d 631, 636-637 (2d Cir. 1996). Because all of Plaintiff's claims arise

[7] See e.g., Law Offices of Curtis v. Trinko, L.L.P., 305 F.3d 89, 98, 101 (2d Cir. 2002) ("While a particular substantive provision [of the Communications Act] may not provide the plaintiff with a particular right, if the violation of that provision injures the plaintiff, sections 206 and 207 of the Communications Act confer upon the plaintiff the right to bring an action to recover for its injuries."); RCA Global Communications, Inc. v. Western Union Tel. Co., 521 F. Supp. 998, 1007 (S.D.N.Y. 1981) (plaintiffs properly stated claims under 206 and 207); ITT World Communications, Inc. v. Western Union Tel. Co., 598 F. Supp. 1439, 1441-1442 (S.D.N.Y. 1984) (attorneys fees arising from previous litigation covered by Sections 206 and 207); APCC Servs. v. WorldCom, Inc., 2001 U.S. Dist. LEXIS 23988 (D.C. 2001) (jurisdiction proper under 206 and 207; defendant's motion to dismiss denied).

from the same fax broadcasting activities as its federal claims against Cox, this Court has supplemental jurisdiction over Plaintiff's remaining claims.

Specifically, Plaintiff's First Cause of Action alleges that all Defendants violated the TCPA through their knowing transmission of unsolicited advertisements. See Compl. ¶¶ 66-74. Plaintiff's Second Cause of Action alleges that Cox caused or permitted the violation of the TCPA by Defendants by providing Fax.com with a customized fax broadcasting network, and that at all times, Cox possessed a high degree of involvement in and had actual notice of Fax.com's illegal fax broadcasting but failed to take steps to prevent Fax.com's continuing violations of the TCPA. See id. ¶¶ 35-39, 75-79. Plaintiff's Third Cause of Action alleges that the Defendants' transmittal of unsolicited fax advertisements is an unlawful business practice that violates the TCPA and an unfair business practice that has no substantial business justification. See id. ¶¶ 80-84. Plaintiff's Fourth Cause of Action alleges that Fax.com, Katz and Cox have all been unjustly enriched through their violations of the TCPA. See id. ¶¶ 85-89. And Plaintiff's Fifth Cause of Action alleges that Katz has taken steps to transfer his and Fax.com's assets to offshore accounts, with the intent to hinder or delay the satisfaction of any potential judgment on TCPA claims. See id. ¶¶ 90-96.

Because each of these claims arise from or relate to the same unlawfully transmitted facsimile advertisements, Plaintiff's remaining claims are transactionally related to Plaintiff's federal claims against Cox. Accordingly, this Court has supplemental jurisdiction over Plaintiff's remaining claims.

B. The Determination of Whether the TCPA is an Opt-In or Opt-Out Statute is a Question of Federal Law, Not State Law.

Defendants contend that even if this Court does not dismiss Plaintiff's federal claim, Plaintiff's TCPA claims raise novel and complex issues of state law, making this Court's exercise of supplemental jurisdiction inappropriate under 28 U.S.C. §1367(c)(1). Specifically, Defendants argue that the question of whether the California Legislature would be required to affirmatively enact legislation – i.e., "opt-in" – before an individual could bring a TCPA claim in California state court is one of state law, which will be determined in a forthcoming appellate

decision in Kaufman, et al v. **ACS** Systems, Inc., et al.[8]

Defendants have gotten the matter exactly wrong. Whether the language of the TCPA, a federal statute, providing that "[a] person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring [an action] in an appropriate court of that State" (47 U.S.C. § 227(b)(3) (emphasis added)) is an "opt-in" provision – requiring enabling legislation from the state legislature – or an "opt-out" provision – allowing a state's consumers to bring a TCPA claim in state court unless prohibited by that state's legislature or rules of court – is a question of *federal law*, not state law. Every federal court to address this question, including the Ninth Circuit in Murphey, has rejected the trial court's holding in Kaufman that the TCPA requires states to enact enabling legislation before their residents may assert TCPA claims in state court.[9]

This consistent line of federal authority effectively resolves the issue, despite the errant holding by the Kaufman trial court. *As* the California Supreme Court recently explained:

> While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight. Where lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law, but where the decisions of the lower federal courts on a federal question are "both numerous and consistenl." we should hesitate to reject their authority.

Etcheverry v. Tri-Ag Service, Inc., 22 Cal.4th 316, 320-321 (2000)

While the Fax.com Defendants assert that "several" California courts[10] have stayed

[8] Case Nos. BC240588, BC240573 (lend case) and Related Cases (Cal. Sup. Ct., County of Los Angeles). In Kaufman, the court misinterpreted the TCPA to require states to affirmatively take steps to authorize a private right of action and found that California had not enacted such legislation. See also Bonime v. Primetime TV, LLC, et al., Case No. BC 269742 (Cal. Sup. Cr., County of Los Angeles) (no enabling legislation passed by California Legislature)

[9] See, e.g., Int'l Science & Tech. Insl., Inc. v. Inacom Commun., Inc., 106 F.3d 1146 (4th Cir. 1997)(TCPA "does not condition the substantive right to be free from unsolicited faxes on stale approval."); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507.513 (5th Cir. 1997) (no enabling legislation required); Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Svscs., Ltd., 156 F.3d 432, 438 (2d Cir. 1989) (adopting holding of Int'l Science: "state courts [are] of general Jurisdiclion, which are presumed competent unless otherwise stated."); Murphey v. Lanier, 204 F.3d 911.914 (9th Cir. 2000) (also adopting holding of Int'l Science that unless a state chooses to "opt-out" of the TCPA, the TCPA claims are properly heard in the state's courts without need for enabling legislation); Nicholson v. Hooters of Augusta, 136 F.3d 1287, 1288 (11th Cir. 1998) (also adopting Int'l Science). Accord Hooters of Augusta, Inc. v. Nicholson, 245 Ga.App. 363, 364-365 (Ga. App. 2000) (en banc); Worsham v. Nationwide, 138 M.D.App. 487, 496-497 (Md.Ct. Spec. App. 2001); Kaplan v. Democrat & Chronicle, 698 N.Y.S.2d 859, 862 (City Ct., N.Y. 1999); Zelma v. Market USA, 334 N.J.Super. 356, 361-367 (N.J. Super. A.D., Aug. 2.2001).

[10] Foundation for Taxpayer and Consumer Rights v. Faxertise, Case No. BC247813 (Cal. Sup. Ct., County of Los Angeles) (case stayed Jan. 28.2002); Bruns v. E-Commerce Exchange, Case No. 00CC02450 (Cal. Sup. Ct., County

proceedings pending the outcome of Kaufman, the vast majority of cases listed in Fax.com's Notice of Pendency of Other Actions or Proceedings have *not* been stayed.[11] Fax.com also fails to explain how Plaintiff's other state law claims – e.g., for unlawful and unfair business practices and unjust enrichment – present any "novel or complex" issues of state law.

C. **Plaintiff's Remaining Claims Do Not Predominate Over Plaintiff's Federal Claims Against Cox.**

The Fax.com Defendants argue that Plaintiff's claims against them substantially predominate over Plaintiff's federal claims against Cox. rendering rhe exercise of supplemental jurisdiction inappropriate under 28 U.S.C. §1367(c)(2). This can best be characterized as a "throwaway argument," as Plaintiff's claims against Cox for violations of the Communications Act are integrally related to the TCPA and other claims against the Fax.com Defendants. See Compl. ¶¶ 75-79. Plaintiff's federal claims against Cox are substantively TCPA claims for Cox's involvement in causing and permitting the Fax.com Defendants' systematic violations of the TCPA. Two of Plaintiff's three other claims are derivative of the TCPA claims -- the unlawful business practices claim and the unjust enrichment claim – both of which are predicated on violations of the **TCPA.** Cox, the only defendant in Plaintiff's federal claims, is also a defendant in these other claims. which arise out of the same transactions. Accordingly. Plaintiff's federal claims againsr Cox should be heard together with Plaintiff's remaining claims against Defendants

of Orange) (case stayed June 13, 2002).

[11] Fax-spnmming cases not stayed pending the Kaufman appeal include: DeWitt **v. Kantor's** Discount. Case No. 2001-029068, (Cal. Sup.Ct., County of Alameda); DeWitt **v.** American Benefit. Case No. C01-02812, (Cal. Sup. Ct. County of Contra Costa); DeWitt v. Katz, Case No. C02-01814, (Cal. Sup. Ct., County of Contra Costa); DeWitt v. Lifequotes, Case No. C01-04578. (Cal. **Sup.** Ct., County of Contra Costa); Hunt v. La Brea Family Dental. Case No. BC275804, (Cal **Sup** Ct., County of Los Angeles); Hunt v. Nakaiye, Case No. BC275805, (Cal. Sup. Ct., County of Los Anpeles); Hunt v American Benefit Mortgage. Case No. 02CC10598, (Cal. **Sup.** Ct., Count; or Orange); Hunt **v.** Mandarino, Case No. 02CC0596, (Cal. **Sup.** Ct., County of Orange); Carroll v. Nutri-Pro **Labs.** Case No. 02CC10594, (Cal. Sup. Ct., County of Orange); Boling v. Travel To Go, Case **No.** GIC758309, (Cal. Sup. Ct., County of San Diego); *Boling* **v Travel** io Go, Case No. GIC758302, (Cal. **Sup.** Ct., County **of** San Diego); Brunk v. American Benefit. Case No. IC775831, (Cal. **Sup.** Ct.. County of San Diego); Diepholz v. Cambridge. Case No. GIC 779284. (Cal. **Sup. Ct..** County of San Diego): Hughes Circuits v. American Benefit, Case No. GIN 022558 (Cal. **Sup.** Ct., County of San Diego); Hughes Circuits v. Canfield Capital, Case No. GIN 022555, (Cal. Sup. Ct., County of San Diego); Hughes Circuits **v. Club** Resort Intervals. Case No. GIN ***022559,*** (Cal. **Sup.** Ct., County **of** San Diego); Hughes Circuits v. Malone, Case No. GIN 02557. (Cal. **Sup.** Ct.. County of San Diego); Hypertouch **v.** Perry Johnson. Case No. CIV418600, (Cal. Sup. Ct., County of San **Mateo);** Kirsch v. Fax.com, Case No. CV810516, (Cal. **Sup.** Ct., County of San Mateo); *Propel v.* American Benefit. Case No. CV807450, (Cal. **Sup.** Ct., County of San Mateo); Propel **v. *Y2*** Marketing, Case No. CV807451, (Cal. **Sup.** Ct.. County of San Mateo); Carroll v. Inkjets2toner.com, Case No. SC033080. (Cal. **Sup.** Ct., County of San Mateo).

The Fax.com Defendants also contend that the TCPA's remedies substantially predominate over the remedies provided for by Section 207. This argument is misplaced – the damages available under Section 207 are the same as the damages available for the underlying violation, in this case the damages available for violation of the TCPA. Under Section 207, any person claiming to be damaged by a common carrier may "bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of [Chapter 5][.]" 47 U.S.C. § 207. Thus, under Section 207. the damages recoverable by a person injured by a common carrier include whatever damages are recoverable under the underlying statute. Here, under the TCPA, a person may recover for "actual monetary loss" from such violation of the TCPA, or "$500 in damages for each such violation, whichever is greater[.]" 47 U.S.C § 227(b)(3). Fax.com's contention that the remedies of Section 207 and the TCPA are somehow different is a misreading of the statutes.[12]

III. PLAINTIFF HAS SUFFICIENTLY ALLEGED CLAIMS AGAINST COX UNDER THE TCPA AND SECTIONS 206 AND 207.

Dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is appropriate only when it appears, beyond a doubt, that the plaintiff can prove no set of facts that would entitle it to relief. Morley v. Walker. 175 F.3d 756, 759 (9th Cir. 1999). All allegations of material fact – including all reasonable inferences drawn from them – are accepted as true and construed in the light most favorable to the plaintiff. Enesco Corp. v. Price/Costco Inc., 146 F.3d 1083, 1085 (9th Cir. 1998); Leatherman v. Tarrant County. 507 U.S. 163. 164 (1993). The sole issue raised by a motion to dismiss for failure to state a claim is whether the facts pleaded would. if established, support a claim for relief. Neitzke v. Williams, 490 U.S. 319.

[12] The cases cited by the Fax.com Defendants in support of their argument, Bodenner v. Graves, 828 F.Supp. 516 (W.D. Mich. 1993) and James v. Sun Glass Hut of California. Inc., 799 F.Supp. 1083 (D. Colo. 1992).are both far afield. In Bodenner. the plaintiff brought one RICO claim and 28 state law claims. In marked contrast here. Plaintiff has brought two federal claims and three other claims. two of which are derivative of the federal claims. This case plainly does not exhibit the "overwhelming predominance" of state law claims found in Bodenner. In James, the court found that the plaintiffs federal ADEA claim was "distinct and foreign" to her six other state law claims for breach of contract. promissory estoppel. fraud. negligent misrepresentation, bad faith and outrageous conduct. which involved damages not recoverable under the ADEA. "causing a substantial expansion of this action beyond that necessary and relevant to the federal claim." 799 F.Supp. at 1085. Here, by contrast. the remedies available to Plaintiff on its federal claims against Cox are the same as those available under Plaintiffs TCPA claim against the remaining Defendants. and the proof required to establish their liability will also be required to establish Cox's liability.

328-329 (1989); Gilligan v. Jamco Develop. Corp., 108 F.3d 246, 249 (9th Cir. 1997)

A. **Plaintiff Has Sufficiently Alleged That Cox Had Both a "High Degree of Involvement" In Fax.Com's Fax-Spamming Operations and "Actual Notice of an Illegal Use" Of Its Services By Fax.Com.**

As Cox acknowledges, a common carrier like Cox may be held liable for violating the TCPA if it exhibits "a high degree of involvement *or* actual notice of an illegal use and failure to take steps to prevent such transmissions." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 F.C.C.R. 8752.8780 (1992) ("FCC TCPA Order") (emphasis added). Here. Plaintiff has alleged facts sufficient lo constitute both a "high degree of involvement" by Cox in Fax.com's violations of the TCPA, and Cox's "actual knowledge of an illegal use" of its services by Fax.com – fax broadcasting in violation of the TCPA. Cox's *own statements* on its website establish that it knew that: (1) Fax.com's "core" business was fax broadcasting advertisements for goods and services ("marketing"); and (2) these advertisements were broadcast to "one of the largest fax databases in the world' (Compl. ¶ 35). negating any reasonable inference that recipients had given their "prior express invitation or permission" to receive these transmissions, which is necessary to make them lawful under the TCPA. No mole is required to establish knowledge of an "illegal use" in violation of the TCPA. See 47 U.S.C. § 227(a)(4) ("The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."). At a minimum. Plaintiff has alleged sufficient facts, including "reasonable inferences" therefrom. Enesco Corp., 146 F.3d at 1085, to entitle Plaintiff to take discovery on the issue.

Not only does Plaintiff allege facts giving rise to a reasonable inference that Cox was aware of Fax.com's "illegal use" of its services; Plaintiff alleges – again in the words of Cox and Fax.com -- that Cox knowingly and deliberately provided Fax.com with all of the custom-tailored infrastructure necessary to engage in its massive and unlawful fax-sparnming operation. See Compl. ¶¶ 35-38; Notice of Apparent Liability of Fax.com, ¶19 ("Fax.com's primary business activity itself constitutes a massive on-going violation of section 227(b)(1)(C) of the [TCPA] and section 64.1200(a)(3) of the Commission's rules, and. . .Fax.com is well aware of

this fact ") Cos did not simply provide some "reliable" phone service to Fax.com. Nor did Cox simply offer a standard service to any subscriber willing to agree to its terms of contract. Rather, Cox determined exactly what Fax.com's business needs were – i.e., fax broadcasting over 3 million unsolicited direct fax advertisements per day, nationwide – and specifically customized its services lo enable Fax.com to send those faxes. Plaintiff's allegations satisfy the alternative test lor common canier liability under the TCPA, i.e., "a high degree if involvement." At a minimum, Plaintiff's allegations, including reasonable inferences therefrom, are sufficient to withstand a motion to dismiss, and entitle Plaintiff to conduct discovery on the issue.

B. Fax.com's Activities Need Not Be Adjudicated Unlawful Before Liability May Be Imposed on *Cos* or Before Cox May Terminate Fax.com's Services.

Cox asserts that Plaintiff'sComplaint fails to allege that Cox had actual notice of illegal conduct and failed to take propel. steps to prevent it. and that the phrase "actual notice of illegal conduct" requires a prior adjudication that the conduct is illegal and a basis to know that the conduct will continue in the future. See Cox MPA at 16. Cox's assertion is based on the FCC TCPA Order, the FCC's order in Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Memorandum Opinion. Declaratory Ruling and Order, 2 F.C.C.R.2819, 2820 (1987) ("FCC Obscenity Order"), and Sable Communications of Ca..Inc. v. Pacific Tel. & Tel. Co., Nos. 84-469, 8-549, U.S. Dist. LEXIS 19524 (C.D. Cal. Feb. 13, 1984), at *7-8. The FCC TCPA Order borrows the language for **TCPA** common carrier liability – "a high degree of involvement *or* actual notice of an illegal use and failure to take steps to prevent such transmissions," – fi-om the FCC Obscenity Order, which relies heavily on Sable. Cox's characterization of Sable, however, is simply wrong, and the FCC Obscenity Order protects only a narrow class of common carriers to which Cox does not belong.

In Sable, Sable Communications ("Sable") had applied for and received a 976 Information Access Service ("976 IAS") from Pacific Bell. The 976 IAS allowed a subscriber– i.e. Sable – to disseminate. for a fee, pre-recorded "sexually suggestive" messages to telephone users who desired access to such messages. Under the terms of the 976 **IAS** agreement, Pacific **Bell** reserved the right to terminate such service "upon receipt of an order of a court so

directing[.]" Id. at *2-? Sable's 976 IAS was later discontinued by Pacific Bell, however, for "at best . one obscene pre-recorded message" that allegedly violated federal and state laws. Pacific Bell sought to preliminary enjoin Sable from transmitting any "obscene" messages in the future.

In denying Pacific Bell's request, the court held that based on the content of "at best" a single pie-iccordcd "obscene" message. enjoining Sable's further transmissions would amount to an unlawful prior restraint. See id. at *6. Although Pacific Bell argued that Sable's future acts would expose it to potential liability under the Communications Act, the Court held that Pacific Bell's "hasty" termination of the allegedly "obscene" transmission precluded an inference of "knowing involvement" in the transmission of those messages. See id. at *7-8. "Like the Court, at this stage. Pacific Bell can do no mole than guess at **what** the content of any future message will be." Id. The court further held that an adjudication of illegal conduct **was** necessary only *under the terms of the agreement* between Sable and Pacific Bell, before Pacific Bell could terminate Sable's 976 **IAS.** See id. at *10 ("[U]nder [Sable's and Pacific Bell's 976 IAS agreement], it appears that the service may not be terminated on the basis of message content without a court order authorizing Pacific Bell to do so.")

In this case. Cos does not have to guess what Fax.com's future transmissions will be. Cox specifically cusromized its sei-vices to meet all of Fax.com's fax broadcasting needs to enable its oil-going violations of the TCPA. See Compl. ¶¶ 35-38.

In addition, Cox is not under a legal duty to wait for an adjudication of Fax.com's violations of the TCPA before canceling Fax.com's service. Compare e.g., Sable Communications. 1984 U.S. Dist. LEXlS 19524, at *7-8. As noted by the FCC, "telephone common carriers are already permitted to deny the use of their facilities for an illegal purpose. . . . Such a prohibition is not inconsistent with its status as a common carrier under our [FCC] rules or the provisions of the Communications ***Act."*** FCC Obscenity Order, 2 F.C.C.R. at 2820. Thus. contrary to Cox's protestations. Cox may at any time, can, and should terminate its services to F;ix.com due to its ongoing violations of the TCPA. See id.; Sable Communications, 1984 U.S. Dist. LEXlS 19524, at *7-8.

The fact that Cox has waited this long before taking **any** action against Fax.com

also argues for Cox's "knowing involvement" in Fax.com's illegal fax broadcasting activities. See id. at *7-8. In contrast to the situation in Sable where the FCC determined that no finding of "knowing involvement" could be ascribed to the common carrier due to its "hasty" termination of only a single alleged obscene phone call; here, Cox has knowingly assisted Fax.com to transmit millions of unsolicited advertisements for years, in blatant violation of the TCPA. See Compl. ¶¶ 18, 20, 22, 35-38, 75-79. Cox has failed to prove "beyond a doubt" that Plaintiff can prove no set of facts that would entitle it to relief. See Morley, 175 F.3d at 759; Conley, 355 U.S. at 45-46.

Cox also overreaches in its attempt to apply the "adjudicated obscene" requirement of the FCC Obscenity Order in the context of the TCPA. In that Order, the FCC, after reviewing the rationale of the Sable court's holding, limited its holding to only administrative decisions by the FCC regarding Multipoint Distribution Service ("MDS") common carriers. As stated by the FCC:

> Thus, for administrative purposes, in interpreting whether MDS common carriers are "knowingly involved" in transmitting obscene material, we will focus upon whether the carrier is passive. Unless an MDS common carrier has actual notice that a program has been adjudicated obscene, to the extent an MDS common carrier confines itself to operation under section 21.903(b)(1) of the Commission's rules [governing MDS common carriers only], it will not be subject to adverse agency action.

FCC Obscenity Order, 2 F.C.C.R. at 2820; see also at 2819 ("This portion of our proceeding examines whether multipoint distribution service (MDS) common carriers may, consistent with the Communications Act (Act), Commission regulations and policies, deny customers the use of their facilities for the transmission of materials which would violate federal, state or local law, including obscene material.").

Thus, although the FCC TCPA Order borrows the common carrier liability language of the FCC Obscenity Order, the clear impact of the FCC's decision appears only directly applicable only to Multipoint Distribution Service ("MDS") common carriers in administrative hearings by the FCC. See id. Cox, however, is not and cannot establish that it is acting as a MDS carrier to Fax.com. An MDS common carrier is a common carrier who provides MDS, or "wireless cable," using over-the-air microwave facilities to transmit video programming.

See Warner, Lisa A., "*Wireless Technologies Creating Competition in the Local Exchange Market: How Will Local Exchange Carriers Compete?*", THE CATHOLIC UNIVERSITY OF AMERICA, 4 CommLaw Conspectus 51, 56 (1996). Here, Cox is only alleged to have acted as Fax.com's telephone common carrier, not as an MDS common carrier. See Compl. ¶¶ 18, 35-38.

The FCC also noted the differences in potential liability for MDS common carriers compared to telephone common carriers if their facilities are used for an illegal purpose, and adopted a higher threshold of actual awareness for MDS common carriers. See FCC Obscenity Order, 2 F.C.C.R. at 2820

> MDS common carriers may be at greater risk than telephone common carriers since they can view programming and be placed on actual notice if the program is to be repeated. We are reluctant to place MDS common carriers in the uncertain predicament of watching all programming and assessing, in each instance whether to engage the legal machinery for interpretative rulings . . . . Thus, for administrative piiiposes, in interpreting whether MDS common carriers are "knowingly involved" in transmitting obscene material, we will focus upon whether the carrier is passive. Unless an MDS common carrier has actual notice that a program has been adjudicated obscene, to the extent an MDS common carrier confines itself to operation under section 21.903(b)(1)[13] of the Commission's rules [goveining MDS common carriers only], it will not be subject to adverse agency action.

Id.: see also 47 C.F.R. §§ 21.900-21.961 (which separately regulates the actions of MDS common carriers and not telephone common carriers)

Despite this higher level of protection for MDS common carriers, the FCC held that even MDS common carriers are under an affirmative obligation to terminate the services of those persons that would violate the law:

> Upon consideration of our analysis of the principles of law and policy set forth herein, we find that MDS common carriers can and in certain circumstances, should take action to ensure that their facilities are not used to transmit material which would violate 18 U.S.C. § 1464 or any other valid provision of federal, state or local law.

FCC Obscenity Order, 2 *FCC* Rcd at 2820; see also at 2820 (question of MDS common carrier liability centers on the "degree of awareness or Involvement present").

[13] 41 C.F.R. § 21.903(b)(1) states: **"Unless service is rendered on a non-common carrier *basis,* the** common **carrier** controls **the operation** of all **receiving facilities (e.g., including any equipment necessary to convert the signal to a standard television channel, but excluding the television receiver): and"**

Thus, cox's contentions that a prior adjudication of an illegal act is required before a *telephone* common carrier – such as Cox – has a duty to terminate its services, is simply incorrect. See FCC Obscenity Order, 2 F.C.C.R. at 2820. A prior adjudication is *only* required for an *MDS* common carrier because they are "at greater risk than telephone common carriers" of being placed on actual notice of an illegal use of their services. See id. Telephone common carriers – such as Cox – are not required to wait until the conduct at issue has been adjudicated illegal. See FCC Obscenity Order, 2 FCC Rcd at 2820 (no prior adjudication of illegal conduct required for telephone common carriers); see also FCC TCPA Order. 7 F.C.C.R. at 8780 (same). Contrary to Cox's assertions, neither Sable, the FCC Obscenity Order, nor the FCC's TCPA Orders discussing the TCPA require an adjudication of illegal conduct before a common canier such as Cox is required to act.

Cox's remaining cases are distinguishable on their facts or in their legal application.[14] Cox's conclusion -- that absent a statutory requirement, court order, or legal adjudication of illegal conduct, a common carrier has no legal basis or duty to terminate common carrier services to a customer – is wholly without suppon and mischaracterizes the authorities it relies upon. For instance. IS U.S.C.§ 1084(d) does not mandate that "a carrier can *only* refuse service after official notification";" but states only that when a common carrier is notified in writing by a law enforcement official that a facility being furnished by it is being used in violation of the law, it shall discontinue such common cai-rier services after reasonable notice to the subscriber.

[14] See e.g., Sprint Corp. v. Evans. 813 F.Supp. 1447, 1457 (M.D.Ala. 1993) (court cites to FCC Obscenity Order. but fails to distinguish between MDS and telephone common carriers and the differing application of federal law: also no indication that common carrier in that case offered anything but a standard service that was not specifically customized to facilitate unlawful activity such as Cox); Howard v. America Online Inc., 208 F.3d 741.752 (9th Cir.) (fails to note that a telephone common carrier *must* discriminate among clients when it has "a high degree of involvement or actual notice of an illegal use and failure to rake steps to prevent such transmissions[.]"; see FCC Obscenily Order. 2 F.C.C.R. at 2820 (which also notes that telephone common carriers are free to terminate services based upon notice of alleged illegal use. no legal adjudication required): People v. Brophy, 120 P.2d 946.956 (Cal. Ct. App. 1950) (no indication common carrier in that case offered anything more than a standard service to paying subscribers. unlike Cox uho specifically designed its services to meet Fax.com's business needs of sending millions of unsolicited faxes in violation of the TCPA: also fails to note or distinguish cases where telephone common carrier has a "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions").

[15] Cox MPA at 17:15, 24-25.

Likewise, a court order is not required – as discussed above – before a telephone common carrier may terminate a customer's services. See FCC Obscenity Order, 2 F.C.C.R. at 2820 (no prior adjudication of illegal conduct required for telephone common carriers); see also FCC TCPA Order, 7 F.C.C.R. at 8780 (same). Nor does California law or the California Public Utilities Commission ("PUC") require a common carrier to "*only* disconnect service for alleged illegal conduct upon written notification from a law enforcement agency."[16] The rule states only that "any communications utility operating under the jurisdiction of the [PUC] shall disconnect existing service to a customer upon receipt [of a written finding] from any authorized official of a law enforcement agency[.]" Cox MPA at 18 n.25. The PUC rule does not limit or circumscribe a common carrier's ability to decline or withdraw its services from a customer.

Cox's citation to Goldin v. Public Utilities Comm'n, 23 Cal.3d 638 (1979) for the proposition that a common carrier may not discontinue services without good cause is also unavailing. Here, Plaintiff's Complaint adequately alleges "good cause" for Cox to discontinue providing services to Fax.com, namely Fax.com's on-going illegal transmission of unsolicited advertisements to millions of consumers nationwide in violation of the TCPA.

Plaintiff's Complaint adequately states a claim against Cox for injuries arising under the Communications Act and TCPA. Cox's motion fails to show beyond doubt that Plaintiff can prove no set of facts that would entitle it to relief. See Morley v. Walker, 175 F.3d at 759; Conley, 355 U.S. at 45-46. Accordingly, Cox's motion to dismiss should be denied.

IV. THE DOCTRINE OF PRIMARY JURISDICTION IS INAPPLICABLE.

Cox argues that if this Court finds that federal jurisdiction exists, and does not otherwise dismiss Plaintiff's claims against it, the FCC's rulemaking proceedings provide the proper forum for addressing certain issues raised by Plaintiff's claims. Specifically, Cox argues that the FCC's proceedings may render Plaintiff's case moot by determining whether in fact Cox or Fax.com have violated the TCPA as common carriers. Cox requests that this Court dismiss, rather than stay, Plaintiff's claims.

Cox's suggestion should be rejected for a number of reasons. First, ordinarily, the

[16] Cox MPA at 18:L. 21-23.

FCC has no authority to adjudicate private TCPA claims. Second, two days after the Notice of Proposed Rulemaking was issued, the FCC was enjoined by a lone federal judge from taking any action to enforce the TCPA, which presumably includes the proposed rulemaking proceedings, and the FCC has stated that it is "abiding by the judge's ruling." Third, the "proposed rulemaking" proceeding to which Cox would have this Court defer is little more than a gleam in a regulator's eye, and may be many years from fruition. Fourth, dismissal under the doctrine of primary jurisdiction is not permitted where, as here, Plaintiff asserts a damages claim, which is subject to a Statute of limitations.

A. The Doctrine of Primary Jurisdiction.

The doctrine of primary jurisdiction is "a prudential doctrine under which courts *may*, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts." Syntek Semiconductor Co., Ltd. v. Microchip Technology Inc., 307 F.3d 775, 2002 U.S. App. LEXIS 20746, **"9** (9th Cir. 2002), amended, 2002 U.S. **App.** LEXIS 16531 (emphasis added). "Primary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the federal courts." Syntek Semiconductor, 2002 U.S. **App.** LEXIS 20746, *9. Nor is the doctrine an equivalent to the requirement of exhaustion of administrative remedies. Id. at *10.

As most recently emphasized by the Ninth Circuit, primary jurisdiction is not a doctrine that "requires that all claims within an agency's purview be decided by the agency." Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1172 (9th Cir. 2002); Syntek Semiconductor, 2002 U.S. **App.** LEXIS 20746, *9. "Nor is it intended *to* 'secure **expert advice'** for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." Syntek Semiconductor, 2002 U.S. App. LEXIS 20746, *9 (quoting Brown, 277 F.3d at 1172); accord United States v. General Dynamics Corp., 828 F.2d 1356, 1365 (9th Cir. 1987).

B. The FCC Cannot Ordinarily Decide Private TCPA Claims.

In this case, neither the language of the TCPA, nor its legislative history, demonstrate any intent by Congress to grant the FCC primary jurisdiction to **hear** or determine

private TCPA claims Rather, both the TCPA's language iind legislative history show that Congress intended to allow TCPA claims to be heard both in federal[17] and state courts.[18] Perhaps most importantly, *no provision of the TCPA allows the FCC to hear private TCPA claims*, although the FCC may intervene as a matter of right in actions brought by the Attorney General of a State. See 47 U.S.C. § 227(f)(3)

Here. it would be *inconsistent* with the TCPA's scheme to require the FCC to resolve the issues in question. Nothing in the TCPA's provisions or Congressional record indicates a Congressional preference foi- allowing the FCC to hear private TCPA claims such as Plaintiff's. Because this particular division of power was not one intended by Congress. the doctrine of primary jurisdiction is not applicable in this context.

C. **The FCC is Unable to Take Any Action With Respect to TCPA Claims Involving Fns.com.**

This Court should not dismiss or stay Plaintiff's TCPA claims against Cox and Fax.com in favor of proceeding before the FCC. because the FCC has been enjoined from taking any action with respect to such claims In an order issued September 20, 2002. the Hon. Stephen N. Limbaugh of the Eastern District of Missouri ordered the FCC to stay "any and all proceedings under the Telephone Consumer Protection Act (TCPA) dealing with unsolicited advertisements transmitted by facsimile, 47 U.S.C. § 227. or related regulations against Fax.com and/or any customer, client or party in privity with Fax.com; . . . ." pursuant to his earlier decision finding that the TCPA violated the First Amendment by infringing on commercial speech. See Docket Sheet, Nixon v. American Blast Fax, No. 00-CV-933 (E.D. Mo.) (Order entered Sept. 20, 2002) (attached hereto as Exhibit B); Missouri v. American Blast Fax, 196 F.Supp. 920 (E.D. Mo. 2002). appeal pending Nos. 02-2705.02-2707 (8th Cir.).

This order directly contradicts the Ninth Circuit's decision in Destination Venturer v. FCC, 46 F.3d 54, 55-57 (9th Cir. 1995). where the Court determined that enforcement of the

[17] A State Attorney may bring a TCPA claim in federal court pursuant to 47 U.S.C. § 227(f)(2) ("Exclusive jurisdiction of Federal courts";.

[18] See 137 Cong. Rec. at S 16205 (Nov. 7. 1991) (statement of Sen. Hollings. sponsor of the TCPA) ("The [TCPA] would allow consumers to bring an action in State court against any entity that violates the bill."); 41 U.S.C. § 227 (b)(3) ("A person or entity may . . . bring in an appropriate court of that State. . . .").

TCPA does *not* interfere with commercial speech in violation of the First Amendment. See also Kenro, Inc. v. Fax Daily, Inc., 962 F Supp 1162, 1167-1169 (S.D. Ind. 1997)(ban on unsolicited fax advertisements is narrowly tailored to achieve the government's intended purpose and does nor violate the First Amendment guarantee of commercial free speech); Texas American Blast Fax, 121 F.Supp.2d 1085, 1091-1092 (W.D. Tex. 2000) (same). Although Judge Limbaugh's decision is not binding on *this* Court – which is obliged to adhere to the Ninth Circuit's contrary decision -- the FCC has publicly stared that it is "abiding by the judge's ruling." DM News. Judge Orders FCC to Stop Pursuit of Fax.com (Oct. 3, 2002) (attached hereto as Exhibit C). Accordingly, the FCC does not provide a viable forum for the airing of Plaintiff's claims.

D. A Stay or Dismissal In Favor of a Nascent Rulemaking Proceeding is Unwarranted.

The "proposed rulemaking" proceeding to which Cox would have this Court defer is little more than a gleam in a regulator's eye. and is likely years from fruition. The FCC has merely requested public "comment on *whether* to revise or clarify our rules governing . . . the use of . . . telephone facsimile machines." In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278, 92-90. Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 02-250.2002 WL 31084939 (F.C.C. Sept. 8, 2002) ("Notice of Pi-oposed Rulemaking"). The FCC has not decided *whether* it will revise the rules: *when* it will decide whether to revise the rules; *what* rules it will revise; or, if il decides to revise any pertinent rules, how many months (or likely years) it will take to issue *proposed* rules, and how many additional months (or years) it will take for those rules to become law (absent court challenges, of course). It would unfairly prejudice Plaintiff and the class to hold their claims hostage to such an open-ended rulemaking proceeding, which. in the end, may not produce anything dispositive of the claims assened here.

E. Dismissal Under the Doctrine of Priniary Jurisdiction Is Inappropriate Where, As Here, Plaintiff Asserts Damages Claims Subject to a Running Statute of Limitations.

Finally, dismissal under the doctrine of primary jurisdiction is inappropriate where. as here, the plaintiff has asserted damages claims subject to a running statute of

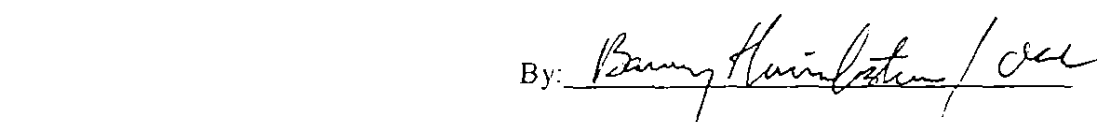
limitations Synick, 307 F.2d at 782. While the faxes received by Plaintiff were sent well within the applicable limitations periods, the putative class includes claims going back to the full limit of those periods, i.e., four years before the action was filed. Coinpl. ¶ 49. Accordingly, dismissal, even without prejudice, would unfairly prejudice absent class members by effectively barring a sizeable portion of their claims

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim should be denied,

Dated: November 26. 2002

Respectfully submitted,

By: 

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